U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: Vermont Service Center Date: JAN 21 2004

EAC 02 262 52603

IN RE: Petitioner:
Beneficiary: [redacted]

APPLICATION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) f the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a native and citizen of Nigeria who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a citizen of the United States.

The director determined that the petitioner failed to establish eligibility for the benefit sought because he was divorced from his allegedly abusive U.S. citizen spouse for more than two years prior to the filing of the self-petition. The director, therefore, denied the petition.

On appeal, counsel asserts that the director failed to consider evidence presented of ineffective assistance of counsel which caused the late filing of the I-360, and he failed to consider any of the evidence submitted in support of the I-130, including the bona fides of the marriage. Counsel resubmits documentation contained in the record of proceeding.

8 C.F.R. § 204.2(c)(1) states, in pertinent part, that:

> (i) A spouse may file a self-petition under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:
>
> > (A) Is the spouse of a citizen or lawful permanent resident of the United States;
> >
> > (B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;
> >
> > (C) Is residing in the United States;
> >
> > (D) Has resided in the United States with the citizen or lawful permanent resident spouse;
> >
> > (E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage;
> >
> > (F) Is a person of good moral character;
> >
> > (G) Is a person whose deportation (removal) would result in extreme hardship to himself, herself, or his or her child; and
> >
> > (H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The petition, Form I-360, shows that the petitioner entered the United States as a visitor on April 13, 1991. The petitioner married his United States citizen spouse on January 28, 1994 at Los Angeles, California. A joint petition for dissolution of marriage was filed by the petitioner and his citizen spouse on June 25, 1997, and the judgment of divorce because effective on April 21, 1998. On August 14, 2002, a self-petition was filed by the petitioner claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his United States citizen spouse during their marriage.

8 C.F.R. § 204.2(c)(1)(ii) states, in pertinent part:

> The self-petitioning spouse must be legally married to the abuser when the petition is properly filed with the Service. A spousal self-petition must be denied if the marriage to the abuser legally ended through annulment, death, or divorce before that time. After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self-petition.

On October 28, 2000, the President approved enactment of the Violence Against Women Act, 2000, Pub. L. No. 106-386, Division B, 114 Stat. 1464, 1491 (2000). Section 1503(b) amends section 204(a)(1)(A)(iii) of the Act so that an alien self-petitioner claiming to qualify for immigration as the battered spouse or child of a United States citizen is no longer required to be married to the alleged abuser at the time the petition is filed as long as the petitioner can show a connection between the legal termination of the marriage within the past two years and battering or extreme cruelty by the United States citizen spouse. *Id.* section 1503(b), 114 Stat. at 1520-21.

The director determined that the petitioner failed to establish eligibility for the benefit sought because he was divorced from his U.S. citizen spouse for more than two years prior to the filing of the self-petition. He maintained that there is no provision of law whereby an alien may self-petition based on a former spousal relationship when more than two years have passed between the date of the legal termination of the marriage and the date of filing of the Form I-360 self-petition.

Counsel, on appeal, asserts that the director failed to consider any of the evidence submitted in support of the I-130, including the bona fides of the marriage. It should be noted, however, that the director did not find any of the other criteria provided in 8 C.F.R. § 204.2(c)(1), including the bona fides of the marriage, to be lacking in this case.

Counsel further asserts that the director failed to consider evidence presented of ineffective assistance of counsel which caused the late filing of the I-360. He contends that the delay in filing the petitioner's I-360 was the result of ineffective legal representation and the Service's own slow process[1] that prevented the petitioner from filing a well-documented I-360 at an earlier date.

The Service is not responsible for the inaction of the petitioner's representative. Further, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of

[1] The petitioner filed a Freedom of Information Act (FOIA) to obtain a copy of his Service file on June 22, 2001, and the response from the Service was dated June 20, 2002. It should be noted that the petitioner was divorced on April 21, 1998, more than two years prior to the filing of the FOIA with the Service.

the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The retainer agreement between Attorney [redacted] (the petitioner's former attorney) and the petitioner, dated January 14, 1998, shows that the attorney agreed to provide services regarding "I-130/FP4/Brother of U.S.C." The petitioner filed a complaint against Mr [redacted] in the form of a complaint form and letter of complaint to the State Bar of California dated April 23, 2001. On August 27, 2002, the Assistant Chief Trial Counsel, State Bar of California, advised the petitioner that the State Bar was in receipt of his complaint, but that Mr. [redacted] had died in March 2001. Therefore, the State Bar would not be investigating the petitioner's complaint, and regretted that they could not be of further assistance to him.

Furthermore, a review of the record shows that the petitioner, in his "Statement in Support of Complaint Against Mr [redacted]" stated that he hired Mr. [redacted] when his wife failed to cooperate with his pending immigration matter, and he went to his office for legal advice on June 16, 1997. On June 23, 1997, Mr. [redacted] submitted a letter to reschedule a Service interview regarding the Form I-130 visa petition. The Service issued another interview notice scheduled for September 16, 1997. Again, his wife did not attend the interview, and Mr. [redacted] requested a new appointment because the petitioner's wife had temporarily abandoned him. The Service issued a Final Notice for interview for October 19, 1998, and Mr. [redacted] responded with a letter dated October 19, 1998, requesting withdrawal of the visa petition. The petitioner stated that he received ineffective assistance of counsel because after Mr. [redacted] withdrew the I-130 visa petition, he advised the petitioner to obtain a divorce because there was no hope for the marriage.

It is noted that on October 19, 1998, the attorney, on behalf of the petitioner and his spouse, requested that the I-130 visa petition be withdrawn because the petitioner and his spouse filed for dissolution of marriage, and the marriage had ended as of April 21, 1998. It is not clear why Mr. [redacted] would advise the petitioner to obtain a divorce after the request for withdrawal of the visa petition on October 19, 1998, when the petitioner and his spouse were, in fact, already divorced six months earlier.

In addition, the petitioner stated that after his attorney withdrew his visa petition and told him to file for divorce he "was too ill informed and not sophisticated enough to ask him what he had in mind." This statement is contradicted by the petitioner's school transcripts that indicate that he was taking law courses from at least the Spring of 1993. An educated individual with a background in legal issues can hardly be "ill informed and not sophisticated."

Although the divorce of the two parties prior to the filing of the petition is no longer a bar as long as there is a connection between the legal termination of the petitioner's marriage within the past two years and battering or extreme cruelty by her spouse, the record reflects that the petitioner and his citizen spouse were divorced on April

21, 1998, and the petitioner filed the instant petition on August 21, 2002, more than two years after the divorce was final. The director is correct in his conclusion. Accordingly, the appeal must be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. The appeal will be dismissed.

ORDER: The appeal is dismissed.